Supreme Court, U.S.
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No. 95-968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

vs.

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

Should this Court exercise its authority under Article III, Section 1, of the United States Constitution to reverse a decision of the United States Court of Appeals for the Third Circuit which squarely conflicts with at least four decisions of this Court which hold that a non-party to a litigation who asserts control of the litigation for his own interest is bound by the result thereof?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States District Court, District of New Jersey, granting Respondents' motion for summary judgment is not reported (Appendix B, A-3-A-8). The decision of the United States Court of Appeals for the Third Circuit, affirming the decision of the district court without opinion, is reported at 67 F3d 291 (Appendix A, A-1-A-2). The decision of the Court of Appeals denying Petitioner's suggestion for rehearing in banc is not reported (Appendix C, A-9).

STATEMENT OF JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was entered on September 20, 1995. The denial of Petitioner's suggestion for rehearing in banc was issued November 9, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 1 of the United States Constitution provides:

The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

A. *The Arbitration*

On November 9, 1990, Petitioner ("Einziger") was discharged by his employer, Stacey Allison Ltd. (the "Company"). Einziger's written employment agreement (the "Agreement") provided that due cause for discharge included the failure to discharge his duties and responsibilities "as determined by the Board of Directors of the Company, whose good faith determination with respect thereto shall be conclusive and binding on the Employee." The Agreement also contained an arbitration provision which provided that an award thereunder "shall include attorneys' fees and costs to the prevailing party".

On December 10, 1990, Einziger commenced arbitration against the Company contesting his discharge. The Company opposed arbitration in an action in the New Jersey Superior Court on the ground that under the Agreement the decision of the board of directors of the Company was binding upon Einziger. On May 6, 1991, the superior court directed arbitration limited to determining "whether the Board of Directors of Stacey Allison, Ltd. acted in good faith" in its decision to terminate Einziger's employment.

Einziger commenced this action on December 28, 1990, prior to the decision of the superior court directing arbitration, asserting federal jurisdiction under 28 U.S.C. §1332 (diversity of citizenship). He alleged that Respondents, the four principals of the Company, who were not parties to the Agreement and hence not subject to arbitration, fraudulently employed him solely in order to obtain his business and had no intention of keeping him in the Company's employ. In September 1991, after the decision of the New Jersey court directing arbitration, Respondents moved to stay this action pending arbitration on the ground that the parties had agreed to arbitrate "the ultimate issue of this action". The district court granted the motion for a stay with Einziger's consent.

After the arbitration commenced, it quickly became apparent that the Company was insolvent and would be incapable of responding to an arbitration award. In view of this, Einziger asked that the Company and Respondents post a bond to secure any assets that were the subject of the arbitration. In the course of litigating this issue, the Company produced an unaudited financial statement from its certified public accountants dated as of December 31, 1990, showing that the company's liabilities exceeded its current assets by $127,504 and its total assets by $50,554. Although the arbitrators rendered an interim award directing the "Officers and Directors" of the Corporation to post a $175,000 bond, the bond was never posted, Respondents arguing that the arbitrators had no jurisdiction over them.

The Company also submitted a memorandum dated March 31, 1992, stating that before the arbitration had even commenced, Respondents had created another corporation ("Padco"), formed in May 1991, to which the Company had transferred its assets. In the words of the memorandum, "Stacey Allison's sole function after the transfer of the assets was to collect certain designated receivables and to pay the liabilities that were not transferred to Padco." The Respondents used some of the remaining assets to pay themselves and one of their wives for "loans and services" to the Corporation. Thereafter, Respondents caused Padco to sell its assets

to an unrelated corporation, CEI Inc., using the proceeds to pay creditors of Padco.

Despite the fact that the Company was insolvent, and had neither money to retain attorneys nor assets to protect, Respondents continued to defend the arbitration in the Company's name for their own interests. In addition, all four Respondents testified in the arbitration hearing and the attorneys ostensibly representing the Company represented Respondents whenever the interests of the Company were not identical to those of Respondents. In September 1993, the arbitrators rendered an award finding that the Company had breached the Agreement by terminating Einziger. The award was confirmed by New Jersey Superior Court. In March 1994, the arbitrators rendered a final award granting Einziger $614,753, including attorney's fees. This award was also confirmed by the Superior Court. Since the Company was insolvent, no part of the award was paid.

B. *Proceedings Below*

After the stay of this action was lifted, the Respondents moved for summary judgment dismissing the complaint on the ground that Einziger, having arbitrated his claim, was estopped from litigating the issue of whether his hiring and discharge had been fraudulent. Einziger cross-moved for summary judgment on two separate grounds: (i) that Respondents themselves in seeking a stay of this action had represented that the issue before the arbitrators and the district court was the same and (ii) that Respondents, having taken control of the litigation against the Company for their own personal interests -- *i.e.*, because they believed a successful result in the arbitration would constitute a defense in this action -- were bound by the result of the arbitration.

The district court granted Respondents' motion without addressing Einziger's argument that Respondents had controlled the defense of the arbitration (A-3-A-8).

The Court of Appeals for the Third Circuit affirmed the decision of the district court without opinion (A-1-A-2), and denied Petitioner's suggestion for rehearing (A-9).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals squarely conflicts with four decisions of this Court. This fact is more important than the specific issue in this case because the deliberate failure of the court of appeals to follow precedent utterly undermines the authority of this Court in declaring and assuring uniformity in the law decided by the federal courts. Moreover, as demonstrated below, the deviation from the rule declared four times by this Court was not only deliberate but was sought to be disguised by the failure of the court of appeals to write a decision.

The most recent decision of this Court with which the decision of the court of appeals conflicts is *Montana* v. *United States* 440 U.S. 147 (1979). That case is so recent that two justices now sitting concurred in the decision. This Court found that a constitutional question presented in the case before it had been adversely determined to the United States in a prior state proceeding and thus held that the United States, although not a party, having exercised control over the earlier litigation, was estopped from relitigating the issue. The Court stated, "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he were a party of record." 440 U.S. 154.

The foregoing quote is taken from *Souffront* v. *La Compagnie des Sucereies de Puerto Rico*, 217 U.S. 475 (1910). In that case this Court held that the true owners of real property were bound by the result of an action conducted by others under their direction and for their benefit. 217 U.S. 486-87. The *Souffront* case, in turn, cited *Lovejoy* v. *Murray* 3 Wall (U.S.) 1 (1865) in which it was held that a party who takes over the

defense of an attaching officer is bound by the result in a subsequent suit against that party. The cases cited by the Court in support of its decision go back as far as the reign of Queen Elizabeth I (3 Wall 18-19). See also *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 n.4 (1961), citing *Souffront* and *Lovejoy*.

There is no doubt that Respondents controlled the defense of the arbitration. The facts are established by their own papers. According to the Company's own certified public accountants, the Company was insolvent as of December 31, 1990, before the arbitration even began; Respondents formed Padco and transferred the Company's assets to it in May 1991, the same month that the New Jersey court directed arbitration; and prior to March 1992 the Respondents caused Padco to sell its assets to CEI, Inc.

Hence, by the time of the first hearing before the arbitrators, the Company was a shell and had no money to retain attorneys or any assets to protect from an adverse arbitration award. Only Respondents could finance the litigation, which they did in their own interest because they believed that a favorable arbitration award would constitute a defense to this action.

If there were any lingering doubt that Respondents controlled the litigation, it is dissipated by a letter written by the attorneys of record for the Company to the court considering Einziger's action to confirm the final award. In that letter, the attorneys expressly advised the court of the pendency of this action and argued that the court, in entering its order confirming the award, should say nothing that would jeopardize Respondents' posture in this action. Obviously, the Company itself would have no interest in the wording of the order on this issue. The letter, although written by the attorneys ostensibly representing the Company, was written on behalf of Respondents. More complete control of a litigation is difficult to imagine.

Given these indisputable facts, Einziger's petition should be granted on the basis of the court of appeals' square conflict

with four decision of this Court. There is more to this case, however, then any maltreatment of Einziger by the lower courts.

First, the court of appeals flouted the law declared by this Court deliberately. Einziger's briefs cited *Montana* v. *United States*, which in turn cited the *Schnell* and *Souffront* cases. In addition, Einziger cited two cases from the Third Circuit, *United States* v. *Webber*, 396 F2d 381 (1968) and *Ark-Tenn Distributing Corp* v. *Breidt*, 209 F2d 301 (1954). Finally he cited numerous cases from other circuits, *e.g., Explosives Corp. of Am.* v. *Garlam Enter. Corp.* 817 F2d 894 (1st Cir.) *cert. den.* 484 U.S. 925 (1987); *Alman* v. *Danin* 801 F2d 1 (1st Cir. 1986); *In re Teltronics Svs. Inc.* 762 F2d 185 (2d Cir. 1985), citing *Souffront; Southmark Properties* v. *Charles House Corp.* 742 F2d 862 (5th Cir. 1984); *In re Gottheimer* 703 F2d 1136 (9th Cir. 1983); *Drier* v. *Tarpon Oil Co.* 522 F2d 199 (5th Cir. 1975); *Von Opel* v. *Brownell* 244 F2d 789 (D.C. Cir) *cert den.* 355 U.S. 878 (1957). Hence, the court of appeals was well aware of the law not only declared by this Court but by all of the courts of appeals which have ruled on the issue for over forty years.

Second, Rule 10.1(c) in this Court provides that a reason for granting a petition for a writ of certiorari is that a court of appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. The reason for this provision is clear: it is to promote uniformity between the decisions of the Court and the lower courts and uniformity among the decisions of the lower courts. This is one of the basic constitutional functions of this Court. Yet, the court of appeals in this case deviated not only from the law declared by this Court but from the law followed by the circuits, including its own.

The importance of this Court's constitutional function of instructing the lower courts and insuring uniformity is illustrated by the cases decided in the immediate past term. During October 1994 Term, this Court accepted 107 cases for review from the circuits and vacated or reversed 84 of those

decisions. See *New York Law Journal*, October 17, 1995, p. 3. In reversing these cases, the Court was exercising its function of declaring federal law and demonstrating to the lower courts what that law is. Uniformity of decisions in following this Court is essential to the bar and to litigants themselves. Litigants, like Einziger here, should be able to read this Court's cases and rely upon them for determining their legal rights or obligations, *i.e.*, they should be able, on the facts of their own cases, to predict what the lower courts are likely to do.

In this case, however, the court of appeals did not write a decision and the decision of the district court was expressly marked "Not for Publication". Thus, a future litigant would have no way of knowing that the United States District Court for the District of New Jersey and the Court of Appeals for the Third Circuit do not always follow the decisions of this Court and do not inform the bar when they fail to do so.

From June 1 through September 29, 1995, the Court of Appeals for the Third Circuit rendered 294 decisions without published opinions. See 61 F3d 894-98; 65 F3d 161-65; 66 F3d 310-14; 67 F3d 291-92; 68 F3d 456-58. Moreover, in only 28 of those cases was any opinion published, either of the lower court or a prior opinion of the court of appeals. Thus, there are 266 cases in the Third Circuit during that four month period that essentially constitute secret law, because they will not appear in the usual digests, or other research tools.

Obviously, the vast amount of litigation in the federal courts today requires the courts to dispose of a great many cases without written opinions. That necessity, however, does not justify the failure of the lower courts to follow established law. Indeed, with so many cases being decided without opinion it is even more important that the lower courts follow established law and not mislead the bar into believing that the law is being followed when it is not. Failure to do so will completely undermine this Court's position as the ultimate residuary and declarer of the law of the United States.

The court of appeals in this case, in the face of *Montana* v. *United States*, *supra*, and the other cases cited to it, simply overruled a result which had been determined by three New Jersey courts and a panel of arbitrators. Why the court of appeals did this is unknown other than perhaps it wanted to bring about a result which it found more "just" than the decisions of the courts that were primarily concerned with the merits of the case. The court of appeals did not write an opinion because it could not — there was no way it could have done so without exposing the fact that it was ignoring the applicable decisions of this Court.

This procedure can only be described as cynical. The court of appeals is well aware of the burdens on this Court and the fact that it is able to grant a small percentage of the petitions for writs of certiorari presented to it. Hence, it believes that its failure to follow the law pronounced by this Court will go unremedied. The creation of a body of law known only to the Court of Appeals for the Third Circuit cripples the constitutional function of this Court and should not be permitted.

CONCLUSION

The facts of this case set forth above cannot be disputed because they come from the written documents filed herein, including Respondents' own submissions. On these facts, the decision of the court of appeals squarely conflicts with four decisions of this Court. The failure of the lower court to follow these cases undermines the power and authority of this Court. The petition for a writ of certiorari should be granted.

Dated: December 15, 1995
New York, New York

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5123

MARK EINZIGER,

Appellant

V.

ARTHUR JACOBS; DONALD HELLER;
ELLIOT BLACK; KENNETH JACOBS

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 90-04779)
District Judge: Hon. Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
September 14, 1995
Before: MANSMANN, SCIRICA and NYGAARD,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered January 26, 1995 by and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT

_____

Circuit Judge

Attest:
/s/ P. Douglas Sisk

_____

P. Douglas Sisk, Clerk
Dated: Sep 20 1995

Certified as a true copy and issued in lieu of a formal mandate on November 17, 1995.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX B

NOT FOR PUBLICATION

UNITED STATE DISTRICT COURT

DISTRICT OF NEW JERSEY

MARK EINZIGER,	:	Civil No. 90-4779 (AET)
Plaintiff,	:	
v.	:	
ARTHUR JACOBS, et al.,	:	OPINION
Defendants.	:	

THOMPSON, Chief Judge

This matter is before the Court on defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment. For the following reasons, the Court will grant defendants' motion.

Background

In 1990, the defendants Arthur Jacobs, Elliot Black, Donald Heller, and Kenneth Jacobs formed Stacey Allison, Ltd. ("SAL"), a corporation intended to produce and sell potpourri and packaging for personal care products. On July 1, 1990, plaintiff Mark Einziger began employment as SAL's Vice President of Operations, pursuant to the terms of a written contract. On November 9, 1990, SAL terminated plaintiff's employment.

On December 5, 1990, plaintiff instituted an arbitration proceeding against SAL pursuant to the terms of his employment contract, section 15 of which provides, "any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall ... be settled by arbitration in accordance with the rules of the American Arbitration Association . . . ."

He asserted breach of contract as the basis for the arbitration proceeding. On December 28, 1990, plaintiff filed this lawsuit alleging that the defendants, as shareholders and directors of SAL, had fraudulently induced him into signing the employment contract in order to steal customers with whom plaintiff had previously done business. On October 7, 1991, this case was stayed case pending the completion of the arbitration proceeding.

On March 29, 1994, the arbitrators entered an award of $614,753.00 against SAL based on a finding that SAL breached the contract. The Superior Court of New Jersey subsequently entered a final judgment confirming the arbitration award. This Court reinstated this case on July 24, 1994. The Court granted each party leave to amend its pleadings to address the arbitration proceedings. Plaintiff added allegations that the arbitrator ordered these defendants, as directors of SAL, to post a bond of $175,000 to secure SAL's assets; that the defendants failed to post the bond; that SAL repaid loans to the defendants during the course of the arbitration; and that SAL has not paid the arbitration award. Defendants amended their answer to assert the arbitration proceeding as a defense. Each party now moves for summary judgment.

Discussion

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied* 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a

genuine issue of material fact. *Id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

In deciding a motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). It is in this light that the Court must analyze the facts of this case.

The Federal Arbitration Act, 9 U.S.C. §§ 1-15, requires courts to recognize and enforce contractual arbitration provisions. A claim that was or should have been decided in arbitration pursuant to such a contractual provision may not be litigated in federal court. *See Schattner v. Girard, Inc.*, 668 F.2d 1366, 1368 (D.C. Cir. 1981). Thus, if plaintiff's employment contract allowed plaintiff to raise his fraudulent inducement claim against the directors in the arbitration proceeding, plaintiff will be barred from asserting it now. *See Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

The first issue the Court must analyze is whether the arbitration clause in the employment contract covers this dispute. The contract requires the arbitration of "any controversy or claim arising out of or relating to this Agreement, or any breach thereof . . . ." The Supreme Court has held that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1982). The Second Circuit has held that claims of fraud in the inducement are arbitrable

unless specifically excluded from an arbitration clause. *S.A. Mineracao Da Trindade Samitri v. Utah Int'l. Inc.*, 745 F.2d 190, 195 (2d Cir. 1984). In light of these standards, the arbitration clause in plaintiff's employment contract is broad enough to encompass claims of fraudulent inducement to the contract.

Plaintiff argues that his claim of fraudulent inducement is not barred because he asserts it against the individual directors of SAL, while the arbitration was against SAL as a corporate entity. The individual directors, however, were within the scope of the arbitration clause and subject to claims asserted under it. It is well established that where "a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreement." *E.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990). The arbitrators in this case recognized that the nonsignatory directors of SAL were subject to its jurisdiction under the arbitration clause as they ordered them to post a bond to secure assets of SAL. The Court is therefore satisfied that the arbitration clause in plaintiff's employment contract covered claims against the directors of SAL.

As plaintiff's fraudulent inducement claim against the directors of SAL could have been raised in the arbitration proceeding, his failure to raise the claim there bars him from litigating it in this Court. Moreover, principles of judicial estoppel now bar plaintiff from establishing a claim of fraudulent inducement. Plaintiff's successful claim of breach of contract in the arbitration necessary established the validity of the contract. Plaintiff may not now argue under the same core of operative facts that the contract is invalid as induced by fraud. *See Economu v. Borg-Warner Corp.*, 652 F. Supp. 1242, 1250 (D. Conn. 1987), *aff'd*, 829 F.2d 311 (2d Cir. 1988).

Conclusion

In light of the foregoing, the Court will grant defendants' motion for summary judgment. An appropriate order will be filed herewith.

UNITED STATE DISTRICT COURT

DISTRICT OF NEW JERSEY

MARK EINZIGER,	:	Civil No. 90-4779 (AET)
Plaintiff,	:	
v.	:	
ARTHUR JACOBS, et al.,	:	ORDER
Defendants.	:	

For the reasons stated in this Court's opinion filed even date herewith;

It is on this 24th day of January, 1995;

ORDERED that plaintiff's motion for summary judgment be and hereby is DENIED; and it is further,

ORDERED that defendant's motion for summary judgment be and hereby is GRANTED and this case is hereby CLOSED.

/s/ Anne E. Thompson

ANNE E. THOMPSON, CHIEF JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5123

MARK EINZIGER,

Appellant

v.

ARTHUR JACOBS; DONALD HELLER;
ELLIOT BLACK; KENNETH JACOBS

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *CHIEF JUDGE*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE AND SAROKIN *CIRCUIT JUDGES*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,

/s/
Circuit Judge

Dated: Nov 09 1995